AT&T

Albert M. Lewis
Director and Senior Attorney
Federal Government Affairs

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-2009
FAX 202 466-2746

August 7, 1997

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW. Room 222
Washington, DC 20554

Re: Ex Parte - CC Docket No. 96-98; CCBPol 97-4
Petition of MCI for Declaratory Ruling That New Entrants Need Not Obtain Separate License or Right-To-Use Agreements Before Purchasing Unbundled Elements

Dear Mr. Caton:

The enclosed material is being delivered today to Mr. Robert Tanner of the Policy and Program Planning Division of the Common Carrier Bureau in connection with the above referenced proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)1.

Very truly yours,

Albert M. Lewis

Enclosure

cc: Mr. R. Tanner

CC Docket No. 96-98, CCBPol 97-4
CC Docket No. 96-237

Intellectual Property Claims, Unbundled Network Elements, and Infrastructure Sharing

The central question in these proceedings is whether an ILEC may evade its statutory obligations by procuring or accepting contract language with third parties that it claims permits or requires it to engage in conduct that the Act forbids.

I. INTELLECTUAL PROPERTY LICENSES OBTAINED BY ILECS CANNOT DISCRIMINATE AGAINST CLECS PURCHASING ACCESS TO UNBUNDLED NETWORK ELEMENTS.

- Under § 251, the ILECs have the explicit obligation to provide nondiscriminatory access to the elements of their network. As the Commission concluded in the Interconnection Order, nondiscriminatory access to those elements is necessary for meaningful local competition to develop,[1] and the prospect of vigorous UNE-based competition is the linchpin of the Commission's recent access charge reform order.[2]

- It would be the very essence of discrimination for an ILEC to procure or accept contract language in its licensing agreements that permits it to use its network elements in certain ways while denying to CLECs access to those same functionalities.

- In light of the clearly discriminatory effect that the ILECs' proposal would have, it is no surprise that their comments on MCI's Petition for Declaratory Ruling in CCBPol. 97-4 make virtually no attempt to reconcile their position with their nondiscrimination obligations.

---

[1] See Interconnection Order, ¶ 388 (loop); id., ¶ 393 (network interface device); id., ¶ 419 (switch); id., ¶ 425 (tandem switch); id., ¶ 446 (interoffice facilities); id., ¶ 481 (signaling links and STPs); id., ¶ 490 (call-related databases); id., ¶¶ 493, 497, 499 (service management system for AIN); id., ¶ 521 (operations support systems); id., ¶ 538 (operator call completion services and directory assistance). Nothing in the recent decision of the Court of Appeals in Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir., filed July 18, 1997), provides any basis to preclude the Commission from deciding the intellectual property issues under Sections 259 and 251(c) of the Act. Section 259 expressly requires the Commission to establish rules under that section. As the Court of Appeals held with respect to section 251(c), moreover, the Act authorizes Commission rules regarding the definition of unbundled network elements, and the Commission therefore has ample authority to clarify that network elements include the embedded intellectual property that provides their functionality.

[2] First Report and Order, Access Charge Reform, CC Docket No. 96-262 et al. (released May 16, 1997).

* The exception is SBC, but its attempt is frivolous. SBC argues that there is nothing discriminatory about requiring CLECs to secure their own licenses because ILECs had to do so as well.

o Foremost, SBC's argument refuses to confront what it means to provide "nondiscriminatory" access. As the Commission held in its Interconnection Order, the Act's requirement that an ILEC provide "nondiscriminatory" access to the elements of its network means that the ILEC must provide access to the CLEC that is at least equal in quality to that which the ILEC provides to itself -- and that thus enables the CLEC to use the ILEC's network in the same ways that the ILEC can -- so as to ensure that the CLEC obtains full benefit of the ILEC's economies of scale. See Interconnection Order, ¶¶ 11, 312. This requirement obviously is not satisfied if the ILEC negotiates contractual arrangements that purport to permit it to utilize capabilities in its network to which CLECs are denied access.

o Moreover, the suggestion that ILECs and CLECs are somehow equally positioned in this matter is refuted by the obvious facts. CLECs would be forced to seek these licenses in a substantially disadvantaged position.

♦ Whereas the ILECs had a choice among numerous vendors at the time they purchased their network hardware and software, and therefore paid a presumptively competitive price, CLECs will have no choice but to deal with the vendor whom the ILEC had previously selected, and will thus almost certainly be required to pay more for the same rights than the ILEC.

This point is effectively conceded by BellSouth's claim in its reconsideration petition in the Infrastructure Sharing docket that vendors would take advantage of any obligation on BellSouth's part to negotiate amendments by charging exorbitant rates. What BellSouth ignores is that if those vendors would extort high fees from BellSouth (their existing and often longstanding customer) they will have even

more of an incentive to do so when negotiating with CLECs. Further, BellSouth is able to spread those higher costs through the UNE prices, while CLECs would have to bear those added costs alone if they were required to negotiate the license agreements themselves. This would create an additional element of discrimination, and would fail any test of competitive neutrality.

- As a party to the license agreement, the ILEC is in a considerably better position than the CLEC in assessing whether in fact any amendments are necessary. That is not only because the ILEC already has ready access to each agreement, but also because a license, like any other contract, is generally construed in accordance with the intent of the parties.[3] See p. 6, infra. At a minimum, it would take much longer for a CLEC to negotiate amendments than an ILEC, and impose far greater costs on the CLEC.

o SBC also claims that CLECs can avoid the necessity of negotiating deals as captive customers of the ILECs' vendors by choosing instead to build their own facilities. But the whole point of Section 251(c)(3) is that building redundant networks will often be completely uneconomical, and that is why Congress gave CLECs the right to obtain network elements from the ILECs on a nondiscriminatory basis.

The only resolution of this issue that creates the proper incentives to ensure the rapid and efficient development of local competition is the rule that the Commission adopted in the Infrastructure Sharing Order: i.e., in those cases in which a license must actually be amended in order to enable an ILEC to provide nondiscriminatory access, it is the duty of the ILEC to "seek" and "obtain" such license amendment in order to comply with its statutory obligations. Report and Order, ¶ 69, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237 (released February 7, 1997). Indeed, it would be arbitrary and capricious for the Commission to adopt two conflicting rules, one under section 251 and the other

---

[3] See Affidavit of Richard L. Bernacchi, ¶ 12, Appended to Reply Comments of AT&T Corp., Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

under section 259, when there is no material difference in the two situations that would justify such a distinction. FERC v. Triton Oil and Gas Corp., 750 F.2d 113, 116 (D.C. Cir. 1984).

II. ILEC CLAIMS THAT APPLICATION OF THESE NONDISCRIMINATION REQUIREMENTS IS "UNWORKABLE" ARE MERITLESS.

- Some of the ILECs, particularly SBC, claim that this resolution is unworkable because it would require an ILEC "to purchase all potential rights for all potential users with respect to all network elements,"[4] and would require CLECs to disclose to ILECs their business plans.[5] That claim is baseless.

  * For the most part, CLECs are seeking access to features and functionalities of the ILECs' networks that the ILECs themselves are permitted to access today under their licenses. In such cases, if an ILEC believes that its licenses prohibit it to comply with its access obligations, the ILEC would need do no more than seek a modification that would extend whatever rights the ILEC currently enjoys to CLECs. Thus, ILECs will need know nothing about a CLEC's business plans in order to satisfy this obligation, and there should be little difficulty in negotiating an amendment which does no more in effect than add the CLEC as a beneficiary to the license.

  * In the event that a CLEC wishes to use an element in an innovative manner not covered by an existing license, the CLEC would have the option of seeking to have the ILEC negotiate on its behalf and sharing any necessary information with the ILEC, or approaching the vendors directly.[6]

---

[4] See SBC Reply Comments, p. 14, Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

[5] Id., p. 13.

[6] Should a dispute arise between an ILEC and a CLEC as to whether an existing license would cover a CLEC's innovative use of an element, or should it be necessary in order for a CLEC to negotiate its own license for such an innovative use, the Commission should make clear that the ILEC must share the contract with the CLEC, subject to an appropriate non-disclosure agreement. Lucent Technologies, for one, has stated it would not oppose such disclosures. See Reply Comments of Lucent Technologies, pp. 12-13, Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

- The ILECs' claim that the principles adopted in the Section 259 proceeding would, if reaffirmed under Section 251, amount to an "expropriation" of vendors' rights, is likewise baseless. Vendors would receive fair compensation that would be determined in negotiations between them and their existing customers, and the only licenses and license amendments adopted would be those to which the vendors agree.

- Nor is it the case that applying the nondiscrimination requirement to network elements that include intellectual property would create incentives on the ILECs' part to negotiate disadvantageous terms and prices for the modified licenses. Intellectual property licenses are not materially different from the many other ILEC assets (e.g., land, equipment) that are inputs to its network and that must be shared with CLECs. To satisfy the Act's requirement that "rates" for UNEs be "just, reasonable and nondiscriminatory," those costs must be shared by all carriers who obtain access to the element, including the incumbent. This means that any licensing fees that the ILEC would negotiate would be imposed on the ILEC as well, thus giving it every incentive to negotiate reasonable terms.

  * ILECs may have incentives to delay necessary negotiations, but that is no different in kind from the many other respects in which ILECs can slow-roll the process of providing UNEs to competitors. These are risks CLECs face in many contexts, and enforcement measures and the incentives created by Section 271 will be no less (or more) effective in this instance than in any other. ILECs would, of course, be subject to both state and federal regulatory complaint proceedings for damages for failure expeditiously to comply with their legal obligations.

III. THE ALTERNATIVE APPROACHES PROPOSED BY THE ILECS WOULD NEITHER COMPLY WITH THE ACT NOR PROMOTE LOCAL COMPETITION.

- Requiring CLECs to negotiate necessary amendments, subject to some "strict burden of proof" by the ILEC that an amendment is necessary, would not be a workable alternative. To begin with, this rule would condemn each CLEC to endless litigation with the ILEC over the scope of each of the numerous licenses claimed to be necessary (80 or more in SBC's case). Such delay would itself constitute the impediment to competitive entry that the Commission's policies must avoid, and would encourage the ILECs to make numerous such claims. More fundamentally, an interpretation of these licenses by the Commission would not necessarily bind the vendors and would thus do nothing to address the ILECs' purported concerns, or the legitimate needs of CLECs to obtain access to network elements free of the prospect of future liability.

- The proposal advocated by the ILECs, which would require each CLEC to separately negotiate its own licensing agreement with each of the ILECs' numerous vendors as a precondition to obtaining access to any of the ILECs' network elements, would create two sets of perverse incentives, each of which would harm and delay competitive entry:

  * The ILECs' proposal would create the incentive for the ILEC to construe its existing licensing agreements as narrowly as possible, thereby relegating competitors to the process of negotiating amendments with the vendors before obtaining desired and necessary network elements. See p. 4, supra. That incentive was vividly illustrated in the comments filed on MCI's Petition for Declaratory Ruling, where both Lucent and Nortel confirmed that in the ordinary course no license amendments would be necessary to enable an ILEC to provide access to network elements while SBC claimed that the restrictions under which it operated were far greater. It is unusual, to say the least, for licensees to construe their licensors' rights more broadly than the licensors themselves. Equally problematically, ILECs would then have the incentive to amend their existing licenses, and to negotiate future licenses, in ways that make it explicit and unambiguous that access to competitors is forbidden.

  * For the reasons discussed above, the ILECs' proposal would also give vendors the incentive -- and ability -- to drastically raise the prices they otherwise would charge customers in a competitive market for their licensing fees. The result of this incentive would be to dramatically increase the cost of UNE-based entry, thus thwarting Congress' intent with regard to local competition while at the same time fatally undermining the Commission's approach to access charge reform -- an approach which is critically dependent on meaningful UNE-based competition.

IV. CONTRARY TO THE CLAIMS MADE BY SOME ILECS, THE COMMISSION'S INFRASTRUCTURE SHARING ORDER IS NOT DISTINGUISHABLE.

* Although "qualifying carriers" under section 259 are those that lack economies of scale, no CLEC enjoys such economies when it comes to the provision of local exchange services. Indeed, the Commission's local competition order makes clear that the primary purpose of section 251(d)(3) was precisely to ensure that CLECs would obtain access to the ILECs' economies of scale and scope. Interconnection Order, ¶ 11. Furthermore, any decision the Commission makes under Section 251 will apply to small CLECs as well as large ones.

* If anything, the ILECs' obligations under section 251 are greater than those under section 259. That is because section 251, unlike section 259, includes the additional statutory requirement that access be "nondiscriminatory." Moreover, because ILECs will have incentives to thwart competition, the Commission's approach under section 259 is all the more necessary and appropriate under section 251, for otherwise ILECs will be rewarded for structuring their licenses in ways that exclude access to competitors.[7]

o Although section 251(d) requires the Commission to "consider" whether access to any "proprietary" network element is "necessary," the Commission has already affirmatively found that access to all of the UNEs that it specified in the Interconnection Order are in fact necessary for competition to be possible. See supra p. 1 n.1.

[7] In this regard, the Commission's Infrastructure Sharing Order makes clear that "qualifying carriers" as defined in section 259 may choose to proceed either by negotiation under section 259 or arbitrations under section 251 and 252. It is thus not the case that the duties imposed under section 251 apply only to carriers seeking to compete with the ILEC.